

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE DOYLE,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 240345

Ingham Circuit Court

LC No. 01-077765-FH

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right one of his three convictions of criminal sexual conduct in the third degree (CSC III), the victim being at least thirteen years of age but less than sixteen years of age, MCL 750.520d(1)(a), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with three counts of CSC III based on allegations that he performed fellatio on complainant on three separate occasions. At the preliminary examination, complainant testified that the first incident occurred on July 4 or 5, 2001, that the second incident occurred approximately two weeks later, and that the third incident occurred approximately two and one-half weeks after the second incident. The information filed in the trial court specified the time frame for the three incidents as July 4, 2001, through August 3, 2001. At trial, complainant testified that the first incident occurred on July 4, 2001, that the second incident occurred at the end of July 2001, and that the third incident occurred prior to July 4, 2001.

Defendant moved for a directed verdict on all counts, arguing that complainant was not a credible witness. The trial court denied the motion, but noted the discrepancy between complainant's testimony regarding the date of the third offense and the information. The jury found defendant guilty of three counts of CSC III.

When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in a light most favorable to the prosecution, could have persuaded a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002).

An indictment or information must contain: (1) the nature of the offense in language designed to fairly apprise the defendant and the court of the offense charged; (2) the time of the offense as near as may be; however, a variance as to time is not fatal unless time is of the essence of the offense; and (3) that the offense was committed within the county or within the jurisdiction of the court. MCL 767.45(1).

Defendant argues that he was entitled to a directed verdict on the third charge of CSC III because the evidence was insufficient to establish that the offense occurred within the time period specified in the information. We disagree and affirm defendant's convictions.

A variance as to the time of the offense is not fatal unless time is an essential element of the offense. MCL 767.45(1)(b). Generally, time is not of the essence or a material element in a criminal sexual conduct case, especially a case involving a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). Complainant testified that defendant performed fellatio on him on three separate occasions, two of which occurred within the time frame specified in the information, and one of which occurred outside that time period. Complainant's testimony that one of the incidents occurred outside the time period specified in the information did not result in prejudice to defendant. The discrepancy between complainant's trial testimony regarding the dates of the offenses and the time period specified in the information did not raise the allegation that defendant committed more than three offenses. Because time was not an essential element of the charge of CSC III, any variance between the information and the trial proofs was harmless. *Id.* at 635.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder